No. 152

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1946

KALAMAZOO STATIONERY COMPANY,
DIVISION OF WESTERN TABLET AND
STATIONERY CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF FOR PETITIONER

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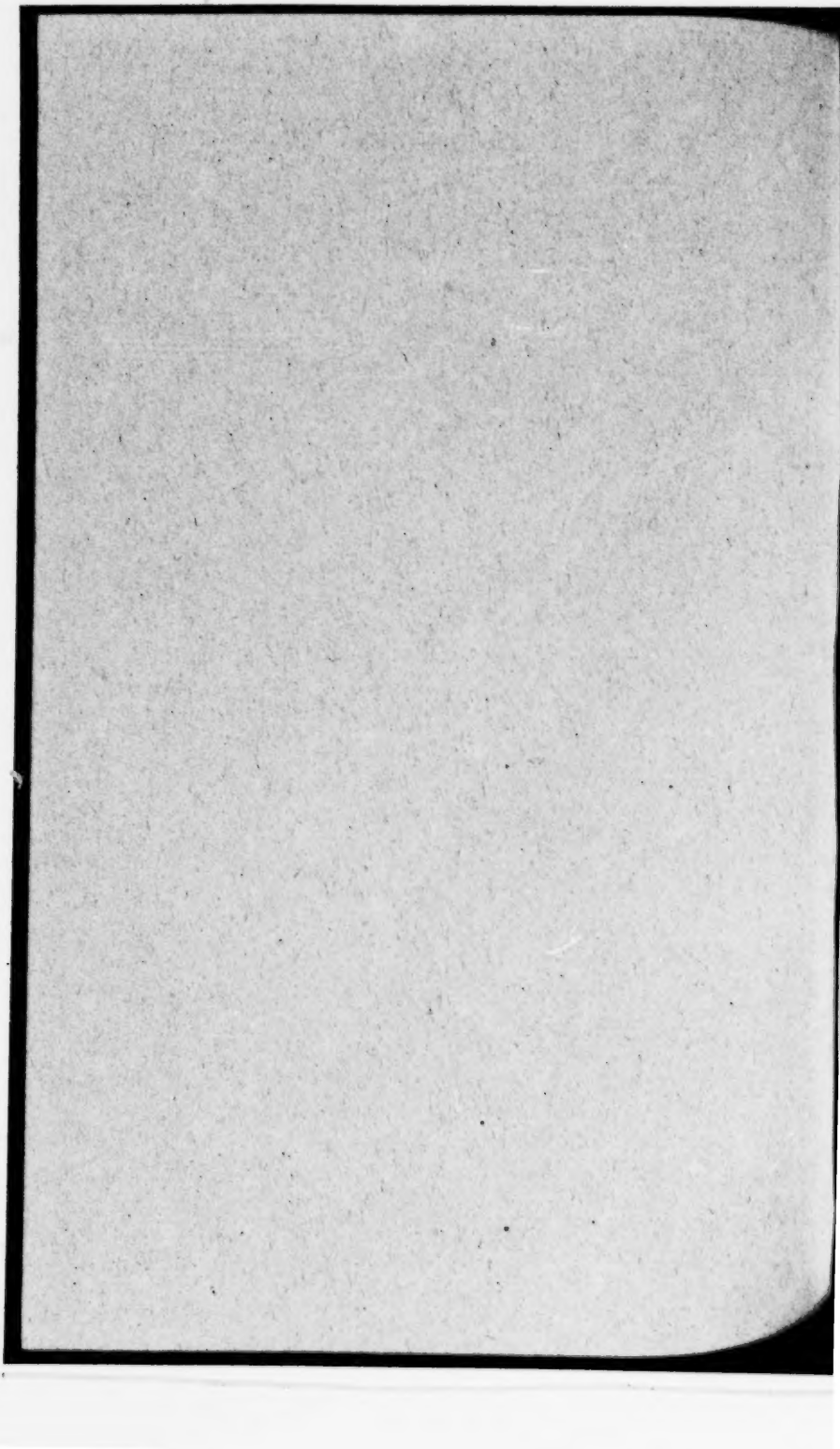

SUBJECT INDEX

CASES CITED

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Kalamazoo Stationery Company, a Division of Western Tablet and Stationery Corporation, prays that a writ of certiorari issue to review the decree and order entered March 31, 1947 granting the request of respondent for enforcement in full of its order theretofore issued against petitioner.

SUMMARY STATEMENT

(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise)

This case presents important questions which involve a Federal question in a way probably in conflict with applicable decisions of this Court, an important question of

Federal law which has not been but should be settled by this Court, and a question of conflict between the provisions of the Michigan State Labor Mediation statute and the National Labor Relations Act (Rule 38(b)). It involves the discharge of two employees, when such employees were representatives of other employees, struck themselves, and urged and incited others to strike, when

(a) The employer was a war contractor;
(b) The employees represented were a minority group;
(c) No strike notice had been filed with Federal authorities pursuant to Section 8 of the War Labor Disputes Act;
(d) The employees failed to continue production under the conditions of Section 8 of the War Labor Disputes Act;
(e) No strike notice had been filed with the State authorities pursuant to the Michigan statute.

The business of petitioner is that of making school supplies, such as tablets, composition books, note books, loose-leaf fillers, envelopes and stationery. Its business has always been somewhat seasonal, that is, its merchandise was manufactured and in the hands of distributors in time for them to get it in the hands of retailers before school opened (287). September, October and November always constituted slack months for the Company (288). Prior to 1943 the Company had adopted the policy of reducing hours during these slack periods rather than laying off some employees and providing more work for others (288). During the war time emergency approximately forty per cent of the production of the Company went either directly or indirectly to the war effort (288).

The city of Kalamazoo, Michigan, in which the petitioner's plant is located, was during the entire year 1944 placed by the War Man Power Commission in a Number 2 area and a compulsory 48 hour week for employees was put into effect (289). The paper allotment to the petitioner, from which practically all of its products were manufactured, was rationed to the Company by the War Production Board. This rationing was done by calendar quarters, and in the event the Company exceeded its paper

allotment for any quarter of the year, such excess was taken from the remaining quarters (289). By August, 1944, petitioner had overcut its paper allotment by at least twenty-five per cent and was therefore compelled to curtail its operations (290). The only way this could be done was through the layoff of employees because of the compulsory 48 hour per week employment for those employees still remaining on the payroll.

A survey showed that the total force of employees would have to be reduced from 380 to approximately 300. This reduction was accomplished by laying off (1st) all part-time workers, and on September 1, 1944 some regular full-time employees (328). In the laying off of full-time employees strict departmental seniority was practiced (328). Harold Hamilton, who was the president of the Union, was the youngest man in point of service in the maintenance department and was the only man from that department who was laid off (329).

Prior to the layoff of Hamilton, and about the middle of August, 1944, the Company had been requested to recognize the International Brotherhood of Bookbinders as the collective bargaining agent for all of its production employees (340). About the 15th of August, 1944, Hamilton and Abraham came to the plant superintendent and requested recognition of the Union, claiming that some of the employees were pretty disgusted because the Company hadn't agreed to recognize the Union, and further stating that a strike or anything else might result unless the Company met with Union representatives (340).

Following that conversation and on August 24, 1944, a meeting was held at which Mr. Haskin, an International organizer for the International Brotherhood of Bookbinders, Hamilton, Abraham and one other employee representing the Union were present, as were Tannehill, the President of the Company, McMahon, Vice President of the Company, and DeLeeuw, General Superintendent of the Company. At that meeting the Union representatives were advised that layoffs were then being made by the Company, that more were to follow so that the number of employees would be reduced by at least 70 on September 1st, 1944. The Union representatives were also in-

formed that the layoff would affect practically the entire plant, but that except for students or part-time employees layoffs would be in accordance with departmental seniority (210, 342). Mr. Haskin's reply to that statement was, "Well, if you handle it that way and you handle it according to departmental seniority, certainly nobody can complain about that" (305).

A second meeting in relation to recognition of the Union by the petitioner was held on August 30th. At that meeting Mr. Haskin representing the Union, a Mr. Cassidy representing the National Labor Relations Board, Tannehill, McMahon, DeLeeuw and Sessions, attorney for the Company, were present (343). At that meeting Haskin and Cassidy were again advised of the layoff (343).

On September 1st, 1944 Hamilton was laid off, and on the evening of that day a meeting of Union members was held in the Hungarian Hall. At that meeting it was determined to call a strike on the morning of September 5th in protest against the laying off of Hamilton and other union members (181, 232). Hamilton, Abraham and Smith wrote out and mailed notices to the Union employees telling them to be on picket duty on the morning of September 5th (137, 211).

Following the meeting of September 1st and on Sunday, September 3rd, Hamilton, Abraham and Smith, as representatives and leaders of the Union, were advised by one Gibbs, a representative of the CIO, that any strike against the petitioner would be illegal because notices had not been filed under the provisions of the War Labor Disputes Act or under the provisions of the Michigan State Labor Mediation Statute (182). Thereupon Hamilton, Abraham and Smith determined to call off the proposed strike and instructed those who had received notices to be on the picket line not to pay any attention to such notices. They also instructed two members of the Union to be at the plant early Tuesday morning and tell everybody to go in to work (182, 183).

The employees did go to work on the morning of September 5th. All during that day rumors were rife in the plant that a strike would be called later on and at four

o'clock of that day (309). About four o'clock McMahon and DeLeeuw started walking through the plant. They went into the Bindery Department first and discovered that part of the machines had been shut down and some of the people were walking out. They saw Abraham in about the center of the department motioning to other operators to shut down their machines and then motioning for such employees to walk out (309). DeLeeuw and McMahon then went to the Box Department and discovered that part of that department had walked out (309). They were informed by the foreman that Abraham had been in the Box Department and had also been to the Spiral Department and talked to Smith; that Smith after talking to Abraham had spoken to some of the employees in the Spiral Department, had informed them that other employees were walking out and that they better come too (218, 310, 403). McMahon and DeLeeuw returned to the main office and looking out of the window saw between 30 and 40 employees who had struck (310). They immediately left the office, walked up to the group of striking employees and asked whether or not it was a strike. Abraham replied that it was a walkout and that they would not go back to work until the 21 union members who were laid off had been put back to work. McMahon then informed Abraham and Smith that they were the ones who were responsible for the strike and that they were discharged (311).

On August 4, 1944 the International Brotherhood of Bookbinders filed a petition with the National Labor Relations Board asking that that Union be certified as the collective bargaining agent for the production and maintenance employees employed by petitioner with the exception of the supervisory employees and office employees (455). On September 14, 1944 a notice of hearing on such petition was served by the National Labor Relations Board on the petitioner (456). On October 7, 1944 a decision and direction of election was issued by the National Labor Relations Board (458).

Pursuant to the direction of election such election was held at the plant of petitioner in Kalamazoo, Michigan, on October 18, 1944, which election resulted in 129 votes be-

ing cast for the Union and 142 votes being cast against the Union, and thereupon an order dismissing the Union's petition was entered November 15, 1944 (461, 462). It was therefore conceded that the members of the Union seeking to secure collective bargaining rights and represented by Hamilton, Abraham and Smith were a minority group. It is also conceded that no strike notices were served or filed under the War Labor Disputes Act or the Michigan State Labor Mediation Act.

Upon this statement of facts the National Labor Relations Board issued its complaint against petitioner (34). Petitioner filed its answer thereto (40). A hearing was held before a trial examiner appointed by the Board. A voluminous intermediate report and findings was filed by the examiner (46), and petitioner appealed the matter to the full board. The board issued its decision and order on March 20, 1946 (85), and in substance ordered petitioner to cease and desist from discouraging membership in International Brotherhood of Bookbinders or in any other labor organization; to reinstate former employees William Abraham and Earl Smith with back pay; and to post notices in its plant at Kalamazoo. Member Reilly dissented from that portion of the order which required the reinstatement with back pay of Abraham and Smith (89). The National Labor Relations Board then petitioned the United States Circuit Court of Appeals for the Sixth Circuit for a decree of enforcement of its order.

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is reported in the record, pages 478-487. The opinion was filed on March 31, 1946 and decree was entered accordingly on the same date (477). In substance the Court held that the Board's findings that petitioner had engaged in unfair labor practices within the meaning of Section 8(1) and 8(3) of the Act were supported by substantial evidence and were conclusive, and that such findings support so much of the Board's order as requires the petitioner to cease and desist from discouraging membership in the union, or in any other man-

ner interfering with its employees in the exercise of their rights to self-organization and collective bargaining, and to post appropriate notices. The Court also found that the Board's finding with respect to the layoff and refusal to reinstate Hamilton was supported by substantial evidence and accordingly justified the dismissal of the complaint as to Hamilton.

The opinion further held that the refusal of the petitioner to reinstate Abraham and Smith because of their participation in the strike was not justified. To this latter finding the petitioner takes exception.

The Court further found that the petitioner was a war contractor under the provisions of the War Labor Disputes Act; that no notices were given to the Secretary of Labor, the National War Labor Board and the National Labor Relations Board prior to the strike, as required under the provisions of the War Labor Disputes Act; that no secret ballot of the employees on the question as to whether they would permit any interruption of war production was held by the National Labor Relations Board on the thirtieth day after such notice in accordance with the provisions of the War Labor Disputes Act, and that consequently employees Abraham and Smith were required to continue production and were not permitted to cease work during the thirty day cooling off period, and by failing to do so violated the provisions of Section 8 of the War Labor Disputes Act. With this holding of the Circuit Court of Appeals we are not in dispute.

The opinion then states that even though a violation of the War Labor Disputes Act on the part of Abraham and Smith did occur and that Abraham and Smith were thereby precluded from voluntarily quitting their work and ceasing production, that such acts did not deprive such employees of their right to strike under the National Labor Relations Act, and that petitioner was under an obligation to reinstate such employees to their former status of employment after the strike was over. We do not agree with this holding of the Court.

The Court finally holds that Abraham and Smith violated the provisions of the Michigan State Labor Mediation Act,

but states that it is unnecessary to construe the provisions of the Michigan Act because such construction is not necessary to a final determination of the case. We also disagree with this portion of the opinion of the United States Circuit Court of Appeals for the Sixth Circuit.

JURISDICTION

Jurisdiction is conferred on this Court to review this cause by writ of certiorari by Sections 10(e) and 10(f) of the National Labor Relations Act (Sections 160(e)) and 160(f), Title 29 U.S.C.A.) (U.S.C. Title 28, Sections 346 and 347).

THE QUESTION PRESENTED

The legal question presented is divided into four parts and is as follows: Whether the discharge of employees Abraham and Smith was proper and no violation of Sections (8) (1) or (3) of the National Labor Relations Act, when such employees were representatives of other employees, they themselves struck, and urged and incited other employees to strike, when

(a) The employees represented were a minority group;
(b) No strike notice had been filed with Federal authorities pursuant to Section 8 of the War Labor Disputes Act;
(c) The discharged employees failed to continue production under the conditions of Section 8 of the War Labor Disputes Act;
(d) No strike notice had been filed with the State authorities pursuant to Michigan law.

REASONS RELIED ON FOR WRIT OF CERTIORARI

The decision of the United States Circuit Court of Appeals for the Sixth Circuit on Section (a) of the question presented is in conflict with applicable decisions of this Court and therefore should be reviewed by this Court.

The decision of the United States Circuit Court of Appeals for the Sixth Circuit in relation to Sections (b) and

(c) of the question presented is without precedent and involves an important question of Federal law which has not been but should be decided by this Court. These sections involve the proper interpretation of Section 8 of the War Labor Disputes Act.

Section (d) of the above question involves the construction and interpretation of a statute of the State of Michigan and which was not construed by the United States Circuit Court of Appeals for the Sixth Circuit because such construction was held by the Court below to be unnecessary to a final determination of the case.

The entire question presented can only be settled by the authoritative decision of this Court and is of broad general interest to both employer and employees.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in holding that employees Abraham and Smith had not forfeited the protection of the National Labor Relations Act while, when representing a minority of the employees, they instigated and participated in a wildcat strike.

2. The Circuit Court of Appeals erred in holding that employees Abraham and Smith had not forfeited the protection of the National Labor Relations Act when they admittedly violated the provisions of the War Labor Disputes Act, Sections 1501 et seq., Title 50 U.S.C.A.

3. The Circuit Court of Appeals erred in failing to hold that employees Abraham and Smith had forfeited the protection of the National Labor Relations Act because they violated the provisions of the Michigan State Labor Mediation Act (Mich. Stat. Ann. Volume 12, Chapter 154, Section 17.454).

ARGUMENT

I. While representing a minority of the employees Abraham and Smith instigated and participated in a wildcat strike against the petitioner.

As we understand the rule, a wildcat strike may be roughly defined as one in which a minority of the employees participate without the sanction of the International Union. There can be no dispute but that such was the fact in the instant case. It was instigated by Abraham and Smith, aided and abetted by Hamilton. The cause was two-fold. First, the layoff of certain union members under a procedure which had been approved by the International Representative of the Union, Mr. Haskin; and, second, because of dissatisfaction resulting from petitioner's refusal to bargain collectively with the Union.

Not having the sanction of the International Union, and in fact not having the sanction of the Local Union because the Local Union had rescinded its action after determining to call it, the strike cannot be considered as anything but a wildcat strike. If this is true, those employees who instigated it, and even those who participated in it, forfeited any rights which they may have had under the provisions of the National Labor Relations Act. As the Court said in *National Labor Relations Board, vs. Draper Corporation,* 145 Fed. 2nd, 199 (C.C.A. 4):

> "It is perfectly clear not only that the wildcat strike is a particularly harmful and demoralizing form of industrial strife and unrest, the necessary effect of which is to burden and obstruct commerce, but also that it is necessarily destructive of that collective bargaining which it is the purpose of the Act to promote. * * * The whole purpose of the Act is to give the employees as a whole, through action of the majority, the right to bargain with the employer. * * * What we do mean to say is that minorities who engage in wildcat strikes, in violation of the rights established by the collective bargaining statute can find nothing in that statute which protects them from discharge."

We also call the Court's attention to the case of *National Labor Relations Board vs. Brashear Freight Lines, Inc.*, 119 Fed. 2d, 379 (C.C.A. 8). Except for the fact in the instant case that one of the reasons for the strike was the layoff of union employees, the facts in the *Brashear* case are almost parallel to the case at bar. There the union during the period involved never had a majority of the employees but nevertheless it demanded a contract. That was true in the instant case. In the *Brashear* case the employer refused to meet with the union representatives. In the instant case petitioner had met twice but had refused to recognize the union as the collective bargaining agent. In the *Brashear* case a union representative gave a signal to the men in the shop and most of those in the union went out on strike and began picketing the plant. In the instant case Abraham gave signals to the workers in his department and Smith urged employees in his department to go out on strike. In the *Brashear* case the Board ordered reinstatement of the striking employees after their discharge, and the Court said:

> "It is clear that the sole reason and occasion for this strike was the refusal to bargain with representatives of the Union. The Union membership never included a majority of the employees in the unit. There was no legal obligation to bargain with this representative of a minority. Even if the position of respondent, at the time of refusal to bargain with a minority representative, was that it would not bargain with a union, yet such minority is in no position to strike because of failure to bargain with it and then receive compulsory reinstatement. Just as the employer, if he refused to bargain with the representative of a majority of a proper unit, acts at his peril; so a minority of the employees, who strike because the employer refuses to bargain with their representative, do so at their peril in so far as compulsory reinstatement is concerned."

For this reason alone, therefore, the discharge of Abraham and Smith was justified and their reinstatement cannot be ordered.

II. The discharge of Abraham and Smith was proper because they admittedly violated the provisions of the War Labor Disputes Act, Sections 1501, Et Seq., Title 50, U.S.C.A.

It is conceded that the notice required under Section 8(a) (1) of the War Labor Disputes Act was not given. It is also conceded that for not less than thirty days after the notice required under Section 8(a) (1) should have been given production was not continued in accordance with the provisions of Section 8(a) (2). It is further conceded that no secret ballot of the employees was taken by the National Labor Relations Board as provided in Section 8(a) (3) of the Act. The Court below said:

> "The essential purpose of Section 8 is to prevent interruptions to war production; this purpose is defeated if the Act permitted employees to discontinue work during the cooling-off period. * * * In short, a construction of the section which authorizes the employees to quit during the cooling-off period runs diametrically counter to the fundamental purpose of the Act, which is to continue production during a thirty day period regardless of the labor dispute involved. The construction which we give to the provisions of the Act that the employees shall continue production, namely, that employees are not permitted to cease work during the thirty day cooling-off period, does not violate any constitutional rights when considered as an incident of the exercise by Congress of its war powers in furtherance of the war effort. *Selective Draft Law Cases* (*Arver vs. United States*), 245 U. S. 366, 389, 390. See also *Falbo vs. United States*, 320 U. S. 549" (485).

While the language of the Court below is extremely broad, we take no exception to the Court's finding in this regard.

The Court, however, then goes on to say:

> "But it does not follow that a violation of Section 8 of the War Labor Disputes Act deprives an employee of his rights under the National Labor Relations Act."

With this statement of the Court we are in violent disagreement.

In substance the lower Court has said that in the absence of the giving of the notice required by Section 8(a) (1) of the War Labor Disputes Act no employee has the right to voluntarily quit his job, because by so doing he has refused to "continue production under all of the conditions which prevailed when such dispute arose". The Court also said:

> "The employee cannot be permitted to discontinue work and at the same time be required to continue production" (484).

If this be true, how then can the Court say that the employee can strike? If the employee strikes, he discontinues work and therefore cannot continue production. This production ceases whether the employee voluntarily ceases to work by simply quitting or whether he, in concert with others, engages in a strike. In both cases production has ceased, and therefore if it is unlawful to discontinue production under the circumstances of this case it matters not whether such discontinuance was caused by quitting or by striking. The unlawful result is the thing which counts.

It is inconceivable that the Congress of the United States ever intended such a construction of Section 8 of the War Labor Disputes Act. An examination of the Congressional Records, as cited in the opinion of the Court below (486), does not bear out the conclusion of that Court. In examining the remarks which were made in Congress by the various members of the House and Senate who served as conferees representing their respective divisions of the Congress we find a statement by Congressman Harness of Indiana which expresses very clearly what Section 8 of the Act means. We quote:

> "Section 8 is the provision that I have so vigorously supported through the entire discussion and debate on this legislation. It provides that due notice *must* be given of any labor dispute involving a war contractor and that no strike or interruption of production *shall be permitted* for a period of thirty days

> thereafter. * * * This, I repeat, is the heart of the measure I offered as a substitute and which the House enacted a week ago. It is by this section that we propose to place in the hands of the rank and file of American Labor the privilege and responsibility to decide of their own volition whether there shall be strikes or work stoppages that may threaten the war effort." 89 Cong. Rec. 5732.

Later on Congressman Harness also said:

> "* * * It should not be necessary to point out, for I am sure that everyone, including labor, understands that this (the right to strike) or any other personal right is always a limited right in that it may never stand above the national welfare and safety. I shall never condone the exercise of this or any other personal right in a way which might endanger national security and welfare, but I shall never admit that the American people are incapable or unwilling to subordinate their personal privileges and interests to the greater good of the nation." 89 Cong. Rec. 5732.

It was argued in the Court below and the Court held that Congress did not intend to withhold the protection of the National Labor Relations Act from employees violating the provisions of Section 8 of the War Labor Disputes Act. It was claimed that Congress refused to include a provision in the War Labor Disputes Act which would have withdrawn all rights under the National Labor Relations Act with respect to violators of the former Act. It was further argued that the non-inclusion of such provision established a policy that the National Labor Relations Board was under no duty to accommodate the National Labor Relations Act to the Congressional purpose expressed in Section 8 of the War Labor Disputes Act.

Petitioner claims that the non-inclusion of the forfeiture provisions referred to above evidences no policy of Congress that violators of Section 8 of the War Labor Disputes Act, if discharged for such conduct, should be ordered reinstated by the Board with back pay. If the forfeitures as proposed in the House bill had been included

in the Act as finally passed, they would have withdrawn the status of "representative" or "labor organization" for the period of one year for the purposes of the National Labor Relations Act. We quote from Board member's Reilly's dissenting opinion in the case of *NLRB vs. Republic Steel Corporation,* 16 L.R.R.M. 218:

> "That the bill, as finally enacted, omitted the forfeiture provision in the bill originally passed by the House is only further evidence that the design of Congress was to restrain labor leaders from concerted activity endangering the war effort without providing any penalty against those persons to whom responsibility for such activity could not be imputed."

Member Reilly further explains that the forfeiture provisions deleted from the Act were so drastic that any labor organization guilty of a violation of the Act would have forfeited its status as a "labor organization" or "representative" not only with respect to the local employees' unit involved but also with respect to all other such units regardless of their proximity to the unit involved in the violation. Certainly, it is a far fetched inference to say that because Congress refused to enact such a forfeiture, which would fall on the guilty and innocent alike, that Congress intended that violators of the Act, when discharged by their employers for such violations, should be ordered reinstated with back pay because the very act of violation constituted "concerted activity".

A violation of Section 8 of the War Labor Disputes Act is the kind of unlawful activity because of which the Board should be required to apply the doctrine of *Southern Steamship Company vs. National Labor Relations Board,* 10 L.R.R.M. 544. In that case this Court said:

> "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the National Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objections. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to

> another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

In the Court below it was argued that the Board was not free to accommodate the legislation it administers to the War Labor Disputes Act, but that argument was founded entirely upon inferences drawn from the non-enactment of the forfeiture provisions, *supra*, for there is nothing in the War Labor Disputes Act which admonishes the Board to deny accommodation. This argument attempts to limit the Board's duty to "accommodate" to those cases where it is expressly ordered to do so, as in the *Matter of American News Company, Inc.*, 55 NLRB, 1302, where the Emergency Price Control Act of 1942 expressly ordered such "accommodation". That is not the doctrine of *Southern Steamship Company vs. National Labor Relations Board, supra*, for the criminal statute there involved placed no express duty upon the Board to "accommodate", yet this Court found such duty to exist.

The doctrine laid down by this Court in *NLRB vs. Fansteel Metallurgical Corp.*, 306 US 240, is also in point. In that case the National Labor Relations Board had ordered reinstatement of sit-down strikers with back pay, but this Court declined to enforce such order because Congress had indicated no intention to preserve rights for sit-down strikers under the National Labor Relations Act. The illegality in the *Fansteel* case above quoted was entirely a matter of local law, whereas the instant case involves a clear Congressional mandate against certain strike activity (Section 8, War Labor Disputes Act).

Certainly it was the duty of the National Labor Relations Board and the duty of the Court below to accommodate the language of the National Labor Relations Act to the language of Section 8 in the War Labor Disputes Act. When such "accommodation" is accomplished it is impossible to conclude that under the circumstances existing here an employee is prohibited from voluntarily quitting his job, yet is not prohibited from engaging in concerted activity by striking.

III. The discharge of Abraham and Smith was justified because of their non-compliance with the cooling-off provisions contained in the Michigan State Labor Mediation Act, Michigan Statutes Annotated, Volume 12, Chapter 154, Section 17.454.

Section 17.454(9) provides that when a dispute arises between employer and employees, and the parties are unable to settle the same, no strike on the part of the employees, nor no lockout on the part of the employer, shall be put into effect before the employees or their representatives, in case of an impending strike, or the employer, in case of an impending lockout, shall serve a notice upon the State Labor Mediation Board with a statement of the issues that are involved.

Section 17.454(10) recites that for a period of not less than five days after the notice is served, or until the Board undertakes an adjustment or settlement of the dispute in a period shorter than five days, it shall be the duty of both employees and employers to use their best efforts to avoid a cessation of employment or a change in the normal operation of the business.

That no notice was served under the provisions of this Act, and that no effort was made on the part of the striking employees to avoid a cessation of employment or a change in the normal operation of the business for the five day period is admitted.

The Act has not been construed by the Supreme Court of the State of Michigan. The Court below said:

> "In the absence of a construction of the Act by that Court (Supreme Court of the State of Michigan), we would be reluctant to construe it in this case unless necessary to reach a decision. Compare *Spector Motor Company vs. McLaughlin*, 323 U.S. 101. We find it unnecessary to construe the Michigan Act in this case" (486).

We admit the general rule that this Court is reluctant to construe a state statute in the absence of a construction by the highest court of the state involved when such con-

struction by this Court is unnecessary to arrive at a proper decision of the case before it. We admit that it is unnecessary to construe the provisions of the Michigan Act if this Court should determine that the lower court was in error in its construction of the meaning of Section 8 of the War Labor Disputes Act and that Section 8 of the War Labor Disputes Act should be construed as claimed by petitioner, or that the lower court was in error in holding that the discharge of Abraham and Smith was not justified because they instigated and participated in a wildcat strike. In the event, however, that this Court should hold that the discharge of Abraham and Smith was not justified because of the admitted violation of Section 8 of the War Labor Disputes Act, or because they instigated and participated in a wildcat strike, then it does become necessary to construe the Michigan statute, a violation of which admittedly occurred.

The Court below, by way of dictum and in referring to the Michigan Act, said:

> "On the other hand, a construction authorizing the discharge of strikers who failed to give the required notice and failed to observe the cooling-off period conflicts with the provisions of the National Labor Relations Act and would not be applicable in this case. The Federal Act does not require the giving of notice of a pending dispute followed by a cooling-off period. Where the enforcement of a state statute impairs, qualifies or in any respect subtracts from any of the rights guaranteed by the National Labor Relations Act, such provisions are ineffective to the extent of such conflict. Citing *Hill vs. Florida,* 235 U.S. 538. Compare *Allen-Bradley Local vs. Wisconsin Employment Relations Board,* 315 U.S. 740" (486, 487).

It is the contention of petitioner that the doctrine laid down in the *Allen-Bradley case, supra,* is controlling. As this Court said:

> "We fail to see how the inability to utilize mass picketing, threats, violence, and other devices, which were here employed, impairs, dilutes, qualifies, or in any respect subtracts from any of the rights guaran-

teed and protected by the Federal Act. Nor is the freedom to engage in such conduct shown to be so essential or intimately related to a realization of the guarantees of the Federal Act that its denial is an impairment of the Federal policy."

Nothing in the Michigan Act "impairs, dilutes, qualifies, or in any respect subtracts from any of the rights guaranteed and protected by the Federal Act". The only thing that the Michigan Act does is to set up a waiting period of five days during which strikes or lockouts cannot take place. There is no diminution of the right to strike. It still exists and can be exercised at any time after the five day period has elapsed. Certainly, it cannot be said that to require a five day waiting period accompanied by notice, so that the State may use its power to mediate labor disputes, is "so essential or intimately related to a realization of the guarantees of the Federal Act, that its denial is an impairment of the Federal policy".

CONCLUSION

For the reasons set forth herein we respectfully pray that the petition for writ of certiorari be granted.

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Division of Western Tablet and
Stationery Corporation.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C., Sec. 151, *et seq.*) are as follows:

* * *

Sec. 2. When used in this Act —

* * *

(3) The term "employee" shall include any employee, * * * and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, * * *

* * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer —

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency desig-

nated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice, may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * *

Sec. 10 (e) * * * No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings

of the Board as to the facts, if supported by evidence, shall be conclusive * * *.

Sec. 13. Nothing in this act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

* * *

The relevant provisions of the Michigan State Labor Mediation Act (*Michigan Stat. Ann.*, Vol. 12, c. 154, Sec. 17.454) are as follows:

* * *

17.454 (1) Public policy, Section 1. — It is hereby declared as the public policy of this state that the best interests of the people of the state are served by the prevention or prompt settlement of labor disputes; that strikes and lockouts and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the state, while not direct parties thereto, should always be considered, respected, and protected; and that the voluntary mediation of such disputes under the guidance and supervision of a governmental agency will tend to promote permanent industrial peace and the health, welfare, comfort, and safety of the people of the state.

* * *

17.454 (8) *Employees may lawfully organize for certain purposes.* Sec. 8. — It shall be lawful for employees to organize together or to form, join, or assist in labor organization, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining, or mutual aid or protection, or to negotiate or bargain collectively with their employers through representatives of their own free choice.

17.454 (9) *Notice to board required before strike or lockout.* Sec. 9 — In the event a dispute arises, and the parties thereto are unable to settle the same, no strike or lockout shall take place or be put into ef-

fect unless, in case of an impending strike, the employees, or their representative, or in case of an impending lockout, the employer or his agent shall serve a notice upon the board of such dispute, together with a statement of the issues involved. Said notice may be served on any member of the Board, or sent by registered mail to the board.

17.454 (10) *Parties must undertake mediation, violation, misdemeanor.* Sec. 9a. — For a period of not less than 5 days after the above notice is served, or until the board undertakes the adjustment and settlement of the dispute or settlement within 5 days, it shall be the duty of both employes and employers to use their best efforts to avoid a cessation of employment or a change in the normal operation of the business, and during such period the parties to said dispute shall undertake a mediation thereof. Violation of this section shall be a misdemeanor and punishable as such.

• • •

17.454 (19) *Liberal Construction of Act; Police Powers.* Sec. 19.—This act shall be deemed an exercise of the police powers of the State of Michigan for the protection of the public welfare, safety, prosperity, health and peace of the people; and all the provisions of this act shall be liberally construed for the accomplishment of said purposes.

• • •

The relevant provisions of the War Labor Disputes Act (Act of June 25, 1943, 57 Stat. 163, 50 U.S.C., Secs. 1501, *et seq.*) are as follows:

Sec. 6 (a) Whenever any plant, mine, or facility is in the possession of the United States, it shall be unlawful for any person (1) to coerce, instigate, induce, conspire with, or encourage any person, to interfere, by lock-out, strike, slow-down, or other interruption, with the operation of such plant, mine, or facility, or (2) to aid any such lockout, strike slowdown, or other interruption interfering with the op-

eration of such plant, mine, or facility by giving direction or guidance in the conduct of such interruption, or by providing funds for the conduct or direction thereof or for the payment of strike, unemployment, or other benefits to those participating therein. No individual shall be deemed to have violated the provisions of this section by reason only of his having ceased work or having refused to continue to work or to accept employment.

(b) Any person who wilfully violates any provision of this section shall be subject to a fine of not more than $5,000, or to imprisonment for not more than one year, or both.

• • •

Sec. 8 (a) In order that the President may be apprised of labor disputes which threaten seriously to interrupt war production, and in order that employees may have an opportunity to express themselves, free from restraint or coercion, as to whether they will permit such interruptions in wartime —

(1) The representative of the employees of a war contractor, shall give to the Secretary of Labor, the National War Labor Board, and the National Labor Relations Board, notice of any such labor dispute involving such contractor and employees, together with a statement of the issues giving rise thereto.

(2) For not less than thirty days after any notice under paragraph (1) is given, the contractor and his employees shall continue production under all the conditions which prevailed when such dispute arose, except as they may be modified by mutual agreement or by decision of the National War Labor Board.

(3) On the thirtieth day after notice under paragraph (1) is given by the representative of the employees, unless such dispute has been settled, the National Labor Relations Board shall forthwith take a secret ballot of the employees in the plant, plants, mine, mines, facility, facilities, bargaining unit, or bargaining units, as the case may be, with respect to

which the dispute is applicable on the question whether they will permit any such interruption of war production. The National Labor Relations Board shall include on the ballot a concise statement of the major issues involved in the dispute and of the efforts being made and the facilities being utilized for the settlement of such dispute. The National Labor Relations Board shall by order forthwith certify the results of such balloting, and such results shall be open to public inspection. The National Labor Relations Board may provide for preparing such ballot and distributing it to the employees at any time after such notice has been given.

(b) Subsection (a) shall not apply with respect to any plant, mine, or facility of which possession has been taken by the United States.

(c) Any person who is under a duty to perform any act required under subsection (a) and who wilfully fails or refuses to perform such act shall be liable for damages resulting from such failure or refusal to any person injured thereby and to the United States if so injured. The district Courts of the United States shall have jurisdiction to hear and determine any proceedings instituted pursuant to this subsection in the same manner and to the same extent as in the case of proceedings instituted under section 24 (14) of the Judicial Code.

INDEX

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 152

KALAMAZOO STATIONERY COMPANY, DIVISION OF WESTERN TABLET AND STATIONERY CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 478–487) is reported at 160 F. 2d 465. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 85–92, 46–79) are reported in 66 N. L. R. B. 930.

JURISDICTION

The decree of the court below (R. 477) was entered on March 31, 1947. The petition for a writ of certiorari was filed on June 25, 1947. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the National Labor Relations Board could properly find that petitioner violated Section 8 (1) and (3) of the National Labor Relations Act by discharging two employees because they participated in a strike in protest against conduct by petitioner which they believed discriminatory, when—

(a) only a minority of the employees participated in the strike;

(b) no strike notice had been filed with Federal authorities pursuant to Section 8 of the War Labor Disputes Act;

(c) the discharged employees failed to continue production under the conditions of Section 8 of that Act;

(d) no strike notice had been filed with State authorities pursuant to Michigan law.

Another question urged by petitioner which we do not believe is presented is whether the Board could properly so find if the discharged employees had been representatives of other employees and had urged and incited other employees to strike.

STATUTES INVOLVED

Pertinent provisions of the National Labor Relations Act, the War Labor Disputes Act, and the Michigan State Labor Mediation Act are set forth in the Appendix to the petition for a writ

of certiorari, pp. 20–25. An additional pertinent provision of the War Labor Disputes Act, Section 10, 50 U. S. C. Sec. 1510, is set forth in the Appendix, *infra*, p. 21.

STATEMENT

Upon the usual proceedings under Section 10 of the Act (R. 32–46), the Board, on March 20, 1946, issued its findings of fact, conclusions of law and order (R. 85–92, 46–80). The facts as found by the Board and as shown by the evidence may be summarized as follows:[1]

In June 1944, petitioner's officials learned that the employees were contemplating unionization and immediately took steps to thwart such a movement (R. 50–51; 170–171, 99, 100–104, 293–294). On June 15, 1944, Plant Superintendent De Leeuw (R. 50, 325) summoned employee Harold Hamilton to his office and informed him that he had learned "in a round-about way" that Hamilton and employee Abraham were starting a union in the plant (R. 50; 103, 293–294). A few moments later petitioner's vice-president and general manager, McMahan (R. 51; 104), entered the office and inquired "Harold, how many are tied up in this thing?", adding, "If I thought you were alone I would fire you" (*ibid.*). When Hamilton intimated that many employees were

[1] In the following statement, record references preceding the semicolon are to the Board's findings, including findings of the Trial Examiner which the Board adopted; succeeding references are to the supporting evidence.

interested in the union and that they had formed an organizing committee, McMahan demanded that Hamilton go out into the factory and "bring the organizing committee in here" explaining "when I get done maybe we won't need a union in here" (R. 51; 104).

After consulting that afternoon with employee Abraham and others, Hamilton learned that the employees desired to be represented by the American Federation of Labor, and he thereupon told first De Leeuw and then McMahan that the employees refused to deal individually with the management because they wanted a union to represent them (R. 51–52; 105–106, 150–151, 433, 440). Upon hearing this McMahan threatened "You will be the sorriest guy on earth before I am done" (R. 52; 106).

Hamilton nevertheless took steps to perfect the organization of a union in the plant; he requested local A. F. of L. headquarters to send an organizer to the plant, and typed A. F. of L. pledge forms which he distributed to interested employees in various departments (R. 52; 107, 108, 152–153). Shortly after these forms were circulated among the employees, Superintendent De Leeuw approached Hamilton and announced, "I have been all over the factory and so far as I can learn it is you, you big bastard that started it all. We have been good to you letting you work all the overtime you pleased, but that is out from now on. From now on remember

you don't get any more overtime. Don't expect any more favors" (R. 52; 108, 152). Thereafter, Hamilton was not permitted to work overtime on weekdays, or to come in and work on Saturdays, although he had previously been authorized to do so whenever he desired (R. 52–53; 97, 99, 108, 117, 159, 163, 433–443).

In addition to depriving Hamilton of overtime privileges, petitioner exacted further reprisal by repeatedly diverting him from his regular work as a skilled machinist and assigning him arduous, menial and distasteful tasks (R. 53–54, 59–60, 85; 97, 99, 127, 146, 164–166, 224, 289, 379–380, 410–412, 416–417, 420–421, 433–440). On one occasion Hamilton was escorted to the pressroom by his foreman Pritchard, who announced "I will make you wish you never heard the word 'Union' or else you quit, by God" (R. 54, 59–60; 108, 109, 154). Pritchard thereupon told Hamilton to wash up a press scheduled for overhaul by another employee, and, while Hamilton was engaged in this task, Pritchard called the attention of the pressroom foreman to the spectacle of the "Union big-shot over there, washing up the press" (R. 54, 59–60; 109, 374–379, 176–177).

On or about August 15, 1944, after Hamilton had been subjected to a series of similar indignities, employees Abraham and Commissaris informed De Leeuw that the employees deeply resented petitioner's discriminatory treatment of Hamilton, and that if it continued the employees

might strike, "most anything could happen" (R. 59; 355, 178, 206–207).

Thereafter, Hamilton was reassigned to his normal work in the maintenance department, but was ordered not to leave the machine shop during working hours (R. 60, 85; 118, 377). This order climaxed a series of attempts by petitioner to preclude Hamilton from soliciting union membership in the plant. Although there was no rule against solicitation and employees generally were permitted to engage in conversations as long as work was not interfered with (R. 58–59; 100, 118, 157–159, 163–164, 166, 385–386, 389, 407, 417), petitioner's foremen prevented Hamilton, after his union activies became known, from speaking to employees in other departments and from soliciting union membership in the plant on non-working time (R. 58–59; 115–116, 155–156, 401–402, 405–406).

Petitioner also exerted pressure on other employees to induce them to withdraw from the union movement. Employees were interrogated about their union affiliations and their grievances (R. 54–55, 56, 57–58, 85; 251–252, 254–255, 228–230, 398–399, 174–176); employee Pelkey was warned by his foreman that employees would receive no help from him if the Union came in and that improvements would not be made (R. 54–55; 252–254). Employee Abraham was told by McMahan that a union would do him no good; that the Company could use a man of his ability

in a better job and that Abraham could be promoted "a lot easier" if there were no union in the plant (R. 58; 174–176).

On the basis of the foregoing findings the Board concluded that petitioner had interfered with, restrained and coerced its employees in the exercise of their self-organizational rights and thereby violated Section 8 (1) of the Act (R. 64–65, 85–86).

On September 1, 1944, in the course of a reduction in force, petitioner laid off employee Hamilton (R. 61; 97, 120, 444–454, 462–463). Hamilton was the only employee laid off from the maintenance department (R. 62; 141, 293, 463, 120), and, of the permanent employees who were laid off, Hamilton alone had been in petitioner's employ for a substantial period (R. 62; 463, 120).[2]

[2] The evidence shows that these factors, combined with petitioner's demonstrated hostility to the Union in general and to Hamilton's activities on behalf of the Union in particular (*supra*, pp. 3–7), hostility which had resulted in actual as well as threatened discrimination against him (*supra*, pp. 3–5), and which had provoked a sharp protest from the employees in August (*supra*, pp. 5–6), led the employees to believe that the selection of Hamilton for lay-off was motivated not by bona fide business considerations but rather by petitioner's desire to rid itself of the outstanding union protagonist in the plant (R. 181–182, 123–124, cf. 86). As the court below held (R. 479) "There is substantial evidence that the [petitioner] discouraged the formation of the union, that it discriminated against Hamilton because of his union membership and activity, and that this attitude on its part towards the union activities led to a proposal on the part of the Union to call a strike." The Board, reversing the Trial Examiner, did not find that the lay-off of Hamilton constituted illegal discrimination (R. 86, 61–64).

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On the evening of September 1, following Hamilton's lay-off, the union members met, and, agreeing that petitioner's attacks upon the Union had finally become intolerable, voted to strike on the next working day, September 5 (R. 65; 123–124, 181–182, 232–233). On Sunday, September 3, however, several of the union members, among them Hamilton, Abraham, and Smith, were informed by a representative of another union that, in his opinion, since no strike notice had been filed, the projected strike would be illegal (R. 65; 124–125, 182). They immediately took steps to prevent the strike from occurring. Union members were notified personally and by telephone that the strike would not take place, and on Tuesday morning two union adherents stationed themselves at the plant gates and told the employees to go in to work (R. 65–66; 125, 182–183, 232, 243, 282). Although the strike plan was abandoned and the employees went in to work, their basic grievance had not been eliminated, and during the day rumors that a strike would occur circulated throughout the plant (R. 65–66; 244–245, 271, 281, 344).

That morning employee Abraham, a skilled printer who was normally not subjected to close supervision, was watched and twice criticized for alleged defective workmanship by his foreman George Nason (R. 66; 183–184, 187–188, cf. 232). Abraham, who believed and sought to demonstrate to Nason that his work had not been in the

least deficient, inferred that Nason was "riding" him because of his prominence in the Union's activities, and at lunch time he so informed a group of employees, among whom were Smith and Commissaris (R. 66; 184, 185, 186, 224, 232). After lunch, Nason continued to watch Abraham and to find fault with him (R. 66–67; 187–188, 205–206). When Abraham finally challenged Nason to deny that he was "doing this because of my union activities," Nason replied that although he was entirely neutral, "You boys have got your neck out a mile" (R. 67; 188). Feeling that his suspicions were confirmed by Nason's pointed reference to the precarious status of union members in the plant, Abraham decided to wash up his press and go home (*ibid.*). Commissaris, who worked near Abraham in the bindery and who had lunched with Abraham that day, observed the latter washing his press and asked where he was going (R. 67; 184, 188–189). Abraham replied that he was "fed up with it" and was going home (R. 67; 189). Commissaris turned to the other employees in the department and called, "Come on, folks, we are going out" (*ibid.*). In response to Commissaris' call, the entire bindery department walked out (R. 67; 189–191). Upon leaving the bindery, Abraham went to the spiral department to tell his sister that he was going home and that the bindery had walked out (R. 67; 190, 218–219, 281). As Abraham passed through the box department on his way out of the plant,

Smith saw him and asked where he was going (R. 67; 191, 219–220). Abraham explained that he was going home and that the bindery had walked out (*ibid.*). Smith thereupon punched out and left the plant, as did several other box department employees who had learned by inquiring from Smith the reason for the walk-out (R. 67; 191, 232–234).

Upon leaving the plant, the employees congregated in groups on the parking lot. Shortly thereafter, DeLeeuw and McMahan approached the group in which Abraham and Smith were standing, and DeLeeuw asked why the employees had walked out (R. 68; 191, 233, 234, 310, 345–346). Abraham replied that the employees would return to work only when the Company reinstated the union members who had been laid off (R. 68; 311, 346). McMahan countered "Well, Bill, you aren't coming back to work because you are all through, and that goes for you, too, Smitty [Smith]; you are the fellows who are responsible for pulling these people out of the plant" (R. 68; 311, 346, 192). Abraham and Smith were then told to get their pay checks and were given separation slips, stating that they had been discharged for "misconduct in connection with work" (R. 68; 346, 470, 471, 265). DeLeeuw told the other employees that unless they returned to work by Thursday morning they, too, would be discharged (R. 68; 192, 311, 346).

The strike continued until September 18 (R. 69; 131–132, 138, 139–140, 469). During the course

of the strike Hamilton, on behalf of the Union, offered to have the employees return to work if petitioner would reinstate Abraham, Smith, and himself. (R. 68–69; 129–131). Petitioner refused the offer. Finally, unable to hold out any longer, the employees who had not been discharged or laid off returned to work (R. 69; 120, 131–132, 140–141, 469).

Before the Board petitioner conceded, and the Board found, that petitioner discharged Abraham and Smith because they had engaged in concerted activity for the purpose of mutual aid and protection (R. 43–45, 86–87, 65–71). Petitioner contended that the discharges were justified, however, because a majority of the employees did not participate in the strike; no strike notice was filed pursuant to the War Labor Disputes Act; and no notice was filed as required by the Michigan State Labor Mediation Act (*ibid.*). The Board found no basis in these objections for depriving Abraham and Smith of the protection of the National Labor Relations Act; it found that by discharging these employees, petitioner violated Section 8 (1) and (3) of the Act, and it ordered petitioner to reinstate them with back pay (R. 86–88, 69–71).

On May 16, 1946, the Board filed in the court below a petition to enforce the Board's order (R. 6–13). On March 31, 1947, the court entered its opinion (R. 478–487) in which it enforced the Board's order in full. The court held that the strike in which Abraham and Smith participated

in protest against petitioner's anti-union tactics, was concerted activity protected by Section 7 of the Act. It further held that such protection was not forfeited because only a minority of the employees participated in the strike, or because the strike was not authorized by officials of the labor organization to which the employees belonged (R. 479–482). The court construed Section 8 of the War Labor Disputes Act as imposing a requirement upon employees to "continue production" for thirty days after the inception of a labor dispute and the filing of a notice thereof, but held that the failure of Abraham and Smith to observe this limitation did not warrant denial to them of the benefits of the National Labor Relations Act since the legislative history of the War Labor Disputes Act discloses that Congress did not intend such a result (R. 482–486). Finally, the court held that in the absence of authoritative interpretation of the Michigan State Labor Mediation Act by the state courts it was unable to determine whether or not that Act was intended to authorize the discharge of employees who struck without observing the designated cooling off period (R. 486). The court noted, however, that if such a consequence were intended the state law could not be given effect since it would thereby subtract from the protection accorded against employer reprisal by the National Act to employees who engage in concerted activities (R. 486–487).

ARGUMENT

1. Petitioner's contention (Pet. 10–11), that the strikers were not entitled to the protection of the National Labor Relations Act because only a minority of petitioner's employees were members of the Union and because the strike had not been authorized by an International Representative of the Union, is entirely without merit. Section 2 (3) of the Act preserves the status of "employee" to "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice." Section 7 protects the right of all "employees" "to engage in concerted activities, for the purpose of * * * mutual aid or protection." This statutory guarantee on its face extends to minorities as well as to majorities, and applies whether or not particular concerted activities are authorized by officers of a labor organization. Cf. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345–347.

Petitioner's claim of conflict with *National Labor Relations Board* v. *Draper Corp.*, 145 F. 2d 199 (C. C. A. 4) and *National Labor Relations Board* v. *Brashear Freight Lines*, 119 F. 2d 379 (C. C. A. 8) rests upon its erroneous assertion that the objective of the strikers in the instant case, as in those cases, was to usurp the position and prerogatives of exclusive bargaining representative. There is no evidence whatever in the

record that the purpose of the strike was to induce petitioner to recognize or bargain with the Union. On the contrary, the undisputed evidence shows (*supra,* pp. 7–8), as the court below found (R. 479–480), that the strike was provoked by petitioner's repeated acts of hostility toward union members, and by the layoff of Hamilton and others on September 1, an act which the employees believed discriminatory (*supra,* p. 7, n. 2). The strikers demanded only that petitioner reinstate the employees who they believed were being discriminated against and from the very first they offered to abandon the walkout on that condition (*supra,* pp. 10–11). Under these circumstances the cases cited by petitioner have no application. As the Circuit Court of Appeals for the Fourth Circuit itself noted in the *Draper* case (145 F. 2d at 205): "We do not mean to say, of course, that a strike can be called only by a bargaining union, or that less than a majority of employees will not be protected when they go on strike in protection of their rights. See *Firth Carpet Co.* v. *National Labor Relations Board,* 2 Cir., 129 F. 2d 633)."

2. No question of importance to the future administration of the National Labor Relations Act is presented by petitioner's contention (Pet. 12–16) that Abraham and Smith should have been denied relief under that Act because of their alleged violation of the War Labor Disputes Act. The latter Act, a temporary wartime measure, ex-

pired, by its term, on July 1, 1947, six months after the President, on December 31, 1946, proclaimed the termination of hostilities. Proclamation No. 2714, 12 F. R. 1. A determination of the impact of such wartime legislation upon the administration of the National Labor Relations Act would therefore have no widespread significance.

In any event, the Board and the court below correctly deemed controlling on this issue the Congressional judgment that employee violations of Section 8 of the War Labor Disputes Act should not be punished by forfeiture of rights or remedies available under the National Labor Relations Act. The War Labor Disputes Act contains no provision authorizing the withholding of such rights or remedies from employees found to have violated Section 8 of that Act. The legislative history, moreover, indicates that Congress considered and rejected a proposal which would have denied to violators of Section 8 the benefits of the National Labor Relations Act.[3]

[3] The provisions of the War Labor Disputes Act dealing with strikes in privately operated plants (subsequently enacted as Section 8), were introduced into the legislation by the House of Representatives (H. Rep. No. 440, 78th Cong., 1st Sess.). As proposed by the House Committee on Military Affairs and passed by the House, three penalties were to be provided in the case of strikes which occurred prior to the filing of a strike notice. The first rendered any person who violated the section liable for damages in a civil suit to any person injured as a result of violation. The second, which ultimately failed of passage in the Senate, empowered federal district courts to enjoin violations or threatened violations.

The legislative history further establishes that this proposal was rejected because Congress desired to preserve to employees all of their pre-existing rights and remedies under the National Labor Relations Act, and did not deem denial of such rights or remedies an appropriate method of insuring compliance with the provisions of Section 8.[4] Members of the conference committee

The third, which was also rejected by the Senate, provided that violators should forfeit their rights under the National Labor Relations Act. (89 Cong. Rec. 5328–5329, 5382.) Congressman Smith of Virginia, the sponsor of these provisions (89 Cong. Rec. 5326–5327), explained that their purpose was to remove the advantages and protection accorded concerted activities under the Norris-LaGuardia Act and the National Labor Relations Act in cases where such activities occurred in violation of the War Labor Disputes Act (89 Cong. Rec. 5304–5305). Following disagreement by the Senate to the amendments of the House (89 Cong. Rec. 5382), a conference committee of both houses met, revised the bill and recommended its adoption in the form in which it ultimately became law (H. Rep. No. 531, 78th Cong., 1st Sess.). The conferees eliminated those provisions of the House bill which would have deprived violators of Section 8 of their rights and remedies under the National Labor Relations Act and the Norris-LaGuardia Act. H. Rep. No. 531, 78th Cong., 1st Sess., pp. 5, 9. The only enforcement provision which the conferees retained in the War Labor Disputes Act was that subjecting violators to civil liability for damages resulting from wilful failure to perform acts required by Section 8 (c).

[4] There is no basis whatever in the legislative history for petitioner's suggestion (Pet. 14–15) that Congress may have rejected the forfeiture provision merely because it was too broad. If Congress had desired to withdraw any protection under the National Labor Relations Act from violators of the War Labor Disputes Act it would not have lacked apt language to accomplish its precise objective.

which struck the forfeiture provision from the House bill made it clear that the reason for doing so was that the provision would have impinged upon rights and remedies available under the National Labor Relations Act and that Congress wanted no "impairment whatever of those rights" (89 Cong. Rec. 5730, 5732, 5733). After the forfeiture provision was stricken, Congressman Thomason explained on the floor of the House that "Whatever rights the laboring man or the labor unions now have under the National Labor Relations Act, they still have them under this bill" (89 Cong. Rec. 5733).

In refusing to consider the fact of violation of Section 8 of the War Labor Disputes Act as justification for withholding the benefits of the National Labor Relations Act from strikers, the Board and the court below heeded the Congressional determination that such violations should have no impact upon administration of the National Labor Relations Act. They clearly observed the mandate of this Court that "When the legislative purpose is so plain," administrative and judicial bodies "cannot assume to do that which Congress has refused to do" *Southern Steamship Co.* v. *National Labor Relations Board,* 316 U. S. 31, 43–44. There are no contrary decisions.

Denial of the benefits of the National Labor Relations Act to persons whose concerted activ-

ities either in manner or purpose violate other laws is, of course, proper only where Congress has left the Board free to accommodate application of the National Labor Relations Act to protection of another public interest which employees have infringed. Thus, in the *Southern Steamship* case, because the impact of preexisting mutiny laws upon the National Labor Relations Act had never been considered by Congress, the Board was held bound to accommodate its policies to the Congressional objectives embodied in those laws. Again, Congress had never had occasion to consider the impact of age-old policies against violent seizure of property upon the Act's protection of concerted activities. This, therefore, in *National Labor Relations Board* v. *Fansteel Corp.,* 306 U. S. 240, was held to be a task for the Board.

Where, on the other hand, Congress enacts legislation with the National Labor Relations Act in mind, as it did in the case of the Emergency Price Control Act of 1942 (56 Stat. 23, 24, 50 U. S. C. App., Supp. V, 901 (a), and the War Labor Disputes Act, the Board is bound to give to the new legislation the effect intended by Congress. Compare, *Matter of American News Co., Inc.,* 55 N. L. R. B. 1302, 1308–1309. The refusal of Congress, after due consideration, to provide in the War Labor Disputes Act that the Board's administration of the National Labor Relations Act should be affected by the newly adopted policies stands in

sharp contrast to the express provision to that effect in the Emergency Price Control Act, and demonstrates the propriety of the Board's refusal to restrict the benefits of the National Labor Relations Act contrary to the intention of Congress.

3. Petitioner's contention (Pet. 18–19), that an application of the Michigan State Labor Mediation Act which would deny to employees who engaged in concerted activities during the cooling-off period the protection against employer reprisal accorded under the National Labor Relations Act would not be in conflict with that Act, is frivolous. As the court below pointed out (R. 487), "The Federal Act does not require the giving of notice of a pending dispute followed by a cooling-off period." Clearly the imposition of such a requirement as a condition to the exercise of rights conferred under the National Act would subtract from the protection accorded concerted activities by Congress. In refusing so to apply the Michigan Act, the Board and the court below followed the controlling decisions of this Court. *Hill* v. *Florida,* 325 U. S. 538, 539; *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, 750–751. Cf. *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* No. 55, October Term, 1946, decided April 7, 1947; *National Labor Relations Board* v. *Reed & Prince Mfg. Co.,* 118 F. 2d 874, 885–886 (C. C. A. 1), certiorari denied, 313 U. S. 595. There are no contrary holdings.

4. As the facts set forth in the Statement show (*supra,* pp. 8–11), and as the Board found (R. 70), Abraham and Smith did not urge or incite other employees to strike. Petitioner neither contended nor established before the Board that they were representatives of other employees. Therefore, the question urged by petitioner (Pet. 8), insofar as it assumes that Abraham and Smith urged and incited other employees to strike, and were representatives of other employees, is not presented.

CONCLUSION

The decision below is clearly correct in all respects here challenged, and presents no conflict of decisions. Moreover, since the War Labor Disputes Act has expired, the question concerning the applicability of that Act in such circumstances as here presented has no importance for the future. The petition for a writ of certiorari should, therefore, be denied.

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JULY 1947.

APPENDIX

Section 10 of the War Labor Disputes Act, (57 Stat. 163, 50 U. S. C. App., Supp. V, 1501, *et seq.*) provides as follows:

> Except as to offenses committed prior to such date, the provisions of this Act * * * shall cease to be effective at the end of six months following the termination of hostilities in the present war, as proclaimed by the President * * *

U. S. GOVERNMENT PRINTING OFFICE: 1947